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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 303.

CALMAR STEAMSHIP CORPORATION,
Petitioner,

vs.

SYDNEY KEITH SCOTT, one of the LLOYD'S UNDERWRITERS and EDINBURGH ASSURANCE CO., LTD., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' BRIEF IN REPLY TO UNITED STATES BRIEF AS *AMICUS CURIAE.*

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WILBUR H. HECHT,
Of Counsel.

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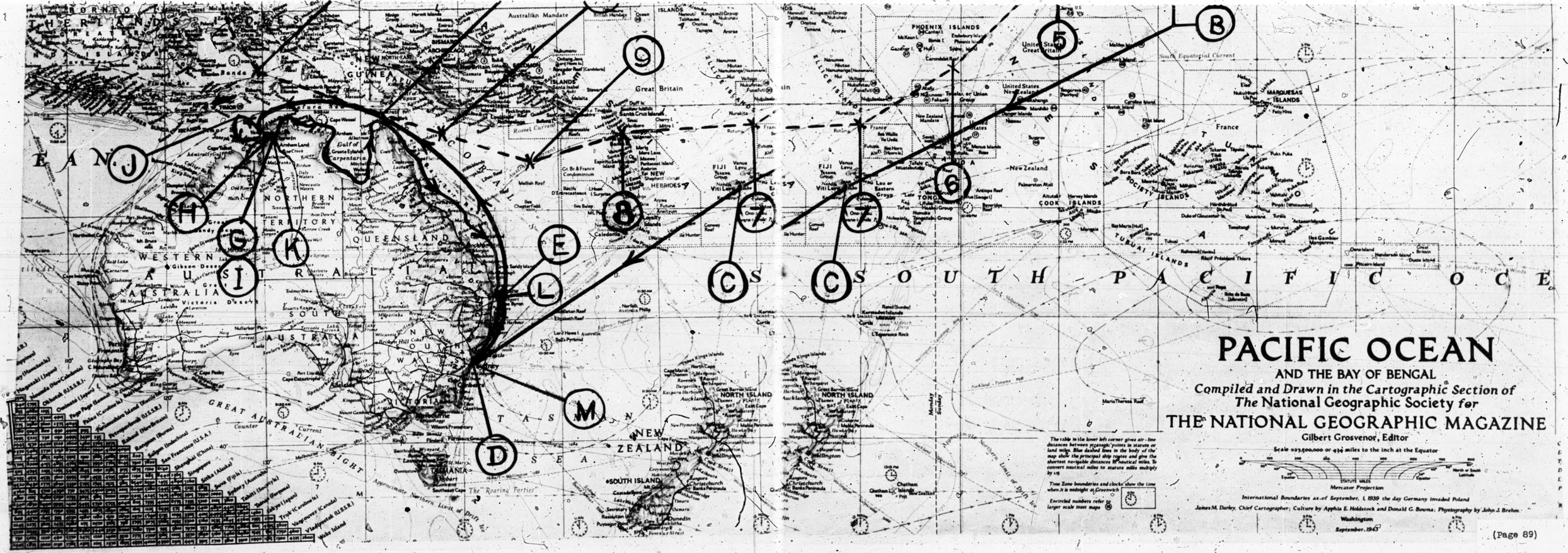
Statement.

Respondents find nothing in the brief of the United States as *amicus curiae*, that disposes of any of the issues of the present controversy. There are, however, factual inaccuracies, some of which require correction, and arguments or proposals which require analysis.

I. Factual corrections.

1. *Amendment of the insured voyage.*

The Government states that petitioner cabled respondents that the vessel was in Australia and requested she be


A U S T R A L I A
S O U T H P A C I F I C O C E A N
Great Britain
NEW ZEALAND
NORTH ISLAND
SOUTH ISLAND
TASMANIA
Australian Mandate
Gulf of Carpentaria
Great Australian Bight
The "Roaring Forties"
Approximate Northern Limit of Drift Ice
Roebuck Current
Counter Current
South Equatorial Current
Monsoon Drift
Northern Limit of Drift Ice
Tasman Sea
Coral Sea
Arafura Sea
Timor Sea
Banda Sea
Celebes Sea
Java Sea
Flores Sea
Northern Territory
Western Australia
South Australia
Queensland
New South Wales
Victoria
Tasmania
Fiji Islands
New Hebrides
Phoenix Islands
Marquesas Islands
Society Islands
Tuamotu Archipelago
Cook Islands
Tonga Islands
New Zealand
France
United States
New Zealand Mandate
Netherlands East Indies
Borneo
New Guinea
Australian Mandate
Solomon Islands
Caroline Islands
Gilbert Islands
Ellice Islands
Tuvalu
Samoa
Tokelau
Tubuai Islands
Pitcairn Island
Easter Island
Norfolk Island
Lord Howe I.
Kermadec Islands
Chatham Islands
Auckland Islands
Macquarie Island
Campbell Island
Antipodes Islands
Bounty Islands
Snares Islands
Solander Island
Stewart Island
Foveaux Strait
Cook Strait
Raoul (Sunday) I.
Curtis I.
L'Esperance Rock
Marie Theresa Reef
Minerva Reef
Penrhyn I.
Nassau I.
Suwarrow I.
Manihiki Group
Rakahanga (Humphrey)
Palmerston Atoll
Penrhyn Group
Danger Islands
Manihiki Group
Rakahanga (Humphrey)
Nassau I.
Suwarrow I.
Penrhyn I.
Danger Islands
Penrhyn Group

held covered pending further advices, and that respondents agreed to comply with this request and so notified petitioner by letter of February 6, 1942 (*brief, p.* 9). The record discloses, however, that despite the fact that on January 22, 1942 petitioner knew that the vessel had arrived at Darwin on January 19th (R. 143), *it did not so inform respondents* by its cable of January 24, 1942 (R. 586). Petitioner merely cabled:

> "*PORTMAR* DIVERTED TO AUSTRALIA ON OUTWARD VOYAGE UNDER GOVERNMENT ORDERS HOLD COVERED PENDING FURTHER ADVICES" (R. 586).

Respondents' agreement was reported by petitioner's London brokers:

> "to hold **this diversion** covered pending your further advices" (R. 593).

It was a *refusal* to cover the *Portmar* indefinitely and everywhere.

This factual inaccuracy is fully discussed in respondants' brief, pp. 20-2, 30-3.

2. *Reasonable value of raising and towing the Portmar.*

The United States (*brief, p.* 13) repeats earlier factual inaccuracies regarding the expenses of the Australian Government Salvage Board in connection with the salvage and towage of the *Portmar* (which for greater clarity we place in parallel columns), as follows:

Government's brief:	Stipulation in the record:
"The actual cost of the services and equipment furnished in raising and towing the *Portmar* was $55,130.00. The **reasonable** value of the services was much greater" (*brief, p.* 13).	"It is stipulated and agreed that the **reasonable** cost of the services and equipment furnished the *Portmar* by the Commonwealth Salvage Board in raising her and getting her from Port Darwin to Brisbane was $55,130.00" (R. 223).

The facts are analyzed in respondents' brief at pages 72-3.

3. *Total repair costs.*

In spite of the specific declaration of *"all damage repairs"*, in the joint survey the Government contends that the agreed total repair expense of $96,000.00 (R. 651) did not "purport to measure the extent of the damage suffered by the *Portmar*, since a large amount of repair work had already been done at Brisbane" (brief, p. 14). That is a completely erroneous inference, because the same signed survey report declared:

> "(a) In determining the above costs the accounts submitted by the United States Army have been examined and are considered reasonable under present conditions.
>
> "(b) The value of materials and supplies utilized in reconditioning the vessel and obtained from the S/S *Rufus King* is—as shown in attached statement —3170.17.3" (R. 652).

and the "work carried out at Brisbane" is listed in detail as the first twenty items of the signed summary attached to the survey (R. 654).

II. The Government's alleged interest in this case No. 303.

The assertion that the Government is financially interested in the outcome of the present case is shown to be erroneous at pages 5 and 6 of respondents' brief. The Government is liable in any event—either to petitioner directly or to respondents by subrogation, even as to the as-yet-unpaid "just compensation" for requisition of title to the *Portmar*.

As to the Government's interest in the nature and extent of insurance, the facts established by the present record and the resulting issues do not constitute an appropriate vehicle to test out the Government's discussions. The extensive comparisons between the nature and essence of "charter parties" and "insurance policies", are beside the point. The Court of Appeals understood the many obvious differences between charters and insurance policies, and merely regarded exclusions of restraint in charters as fairly analogous to similar exclusions in insurance.

The repeated suggestion that the decision of the Court of Appeals might have a deterring effect on shipowners' willingness to cooperate in the event of another war does scant justice to the patriotism of American shipowners and masters. The present suit is purely of financial motivation. There is no suggestion that the Army did any wrong in taking over the *Portmar* at Suva and thereafter. On the contrary, what the Army did was appropriately done to win the war. That purpose was paramount, it was for the *public* weal. The sacrifice of the *Portmar*, therefore, should be borne as a *public* charge—not charged to petitioner because it happened to own the vessel, nor to respondents whose policy conditions were carefully circumscribed by the Maritime Commission to exclude all restraints by the United States Army.

III. The "discussions" in the Government's brief as *amicus curiae*.

The matters discussed in the Government's brief purport to be based upon some of the incidents appearing in the present record, but they are unrelated to the issues involved. Limitations of time and space preclude an analysis of the more than 80 citations.

Some of the propositions set forth in the brief, however, require comment:

1—*The "Free of British Capture" rider:*

The Government refers to the "Free of British Capture" rider (pp. 24, 25), but nowhere mentions the first part of the rider, analysis of which would supply a complete answer to most of the questions the brief raises. This Court, in *Standard Oil Co.* v. *United States*, (*The Llama*) (1925), 267 U. S. 76 definitely established the American law that *full* war risk coverage insures against all losses that follow in the wake of Governmental restraint. If the *Portmar* policies had not included the "Free of British Capture" rider, all that happened to the *Portmar* after the first Governmental restraint (at or prior to Suva) would have been covered. But the first part of that rider was an unqualified exclusion of all Allied restraints, as shown in respondents' brief (pp. 22-26), and all such restraints were thereby assumed by petitioner.

As suggested by the Government as to deviation cases, "the underwriter's liability for a subsequent loss is to be determined by reference to the terms of the policy" (*brief, p.* 40), is equally applicable to every possible liability of respondents. In a footnote (p. 24), the Government refers to the records of the American Institute of Marine Underwriters. Those original records are in the appeal record

(R. 671-684). They show that Mr. B. K. Ogden attended on those deliberations, as a representative of the U. S. Maritime Commission (R. 674).

The *Portmar* Charter Party was drafted by the Government (R. 159-160), required a specific form of war risk coverage (R. 35), and the coverage was approved by the same Mr. B. K. Ogden, Director, Division of Insurance for the Maritime Commission (R. 602). The Government's present discourse on "the burden of uncertainty" (pp. 23, 24, 37, 39, 56, 57), what should or should not have been covered, how much of each risk should now be allocated to petitioner or to respondents, and what additional time petitioner should be allowed to reinsure after policy termination, relates to contingencies established and fixed by the contract terms. Those terms had been prescribed by the Insurance Department of the Maritime Commission under Mr. Ogden, its representative on the body which prepared the "Free of British Capture" clause "* * * which covers while being detained for inspection by the British, * * *" (R. 674). It does not lie with the Government to question that action or language which its representative knew and participated in, twenty-two months before the *Portmar* policies were written.

The Government's footnote (p. 24) refers to the language of the Institute (R. 674), Mr. Winter's language on that point was:

> "But it was always within the framework of that voyage, of that particular incident of the voyage." (R. 251).

The rights and obligations of the petitioner and the respondents are derived from the terms and conditions of the policies—not on economic considerations. This Court has on innumerable occasions stated that basic principle.

One such statement that clearly announces it is in *Imperial Fire Ins. Co.* v. *Coos County* (1893), 151 U. S. 452, 462, as follows:

> "Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other, and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. * * * The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

The entire "Free of British Capture" rider is analyzed in respondents' brief at pages 22 to 26, and 33 to 45.

2—*The existence and items of the* Portmar *charter party are entirely irrelevant and immaterial.*

The Government does not base its discussion on the "insured voyage" which alone concerns respondents, but on the "charter period" (*brief, p.* 18), "latitude permitted by the charter" (*brief, p.* 21) and similar "charter" references (*brief, pp.* 41, 42, 47).

As to respondents, the charter incidents are entirely *"res inter alios acta"*. The charter party and the Government as charterer are complete strangers to the insurance policies, as shown in respondents' brief (*pp.* 56-58). *Hughes* v. *The Union Insurance Company of Baltimore* (1823) 8 Wheat. 294, 306-307.

3. *The termination of the insured voyage and, therefore, the insurance policies.*

The Government is clearly in error in its assumption that the District Court made no finding that the insured voyage had terminated. We quote the District Court's finding:

> "It was the act of paramount power which *prevented the homeward voyage* and sent the *Portmar* on to Timor" (R. 747).

As shown in respondents' brief (*pp.* 8 to 23) the Court of Appeals correctly held that the "insured voyage" had come to an end before the loss occurred (R. 793), and the risk of restraint was excluded from the coverage, and was assumed by the petitioner itself. (*The Ada*, 241 N. Y. 197, 211; *Speyer* v. *New York Ins. Co.*, 3 Johns. (N. Y.) 88; *Graham* v. *Pennsylvania Ins. Co.*, F. Cas. 5674, 2 Wash. C. C. 113, 130; *Dole* v. *New England M. M. Ins. Co.*, 2 Clif. 394, 415). As a consequence of the insured voyage being broken up by an uninsured peril, it followed as a matter of law that the policy was terminated, for it is impossible to reconcile a continuance of liability under an insurance contract when the vessel is no longer within the contract limits. *The Ada* (1925) 241 N. Y. 197. Neither *The Llama* (267 U. S. 76) nor *The Rickards* case [1942] A. C. 50, casts any doubt upon that proposition, because in both cases the restraint which caused the loss had already occurred on the "insured voyage". If the risk of restraint had been excluded in those cases (as it was in the *Portmar* policies), there could have been no recovery.

The Government's assumption that restraint of princes is not a risk at all (*brief, pp.* 20, 40) is entirely erroneous. It is the heart of every Capture, Seizure and Restraint risk.

Conclusion.

The decision herein of the United States Court of Appeals for the Second Circuit should be affirmed.

Dated: New York, New York, January 14, 1953.

Respectfully submitted,

RUSSELL T. MOUNT,
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WALTER B. HALL,
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Of Counsel.

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ON PETITION FOR REHEARING ON THE MERITS.

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ON PETITION FOR REHEARING ON THE MERITS.

Respondents, Sydney Keith Scott, one of the Lloyd's Underwriters, and Edinburgh Assurance Co., Ltd., *et al.*, present this petition for a rehearing, and, in support thereof, respectfully show:

I.

The prevailing opinion of this Court has held that the insured voyage of the *Portmar* was not frustrated or terminated prior to the damage sustained by her on February 16 and 19, 1942, on the ground that "It is not maintained, nor could it be, that an explicit decision, objectively provable, not to allow the *Portmar* to continue on her voyage was ever reached by the authorities" (Opinion, p. 12), and that coverage cannot end "before an unambiguous, objectively provable decision has been made by the requisitioning sovereign to cause abandonment of the voyage" (Opinion, p. 17).

In *Borup* v. *Western Operating Corporation* (1942, 2 Cir.), 130 F. (2) 381; cert. denied 317 U. S. 672; *The Claveresk* (1920, 2 Cir.), 264 F. 276; *Allanwilde Corporation* v. *Vacuum Oil Co.* (1918), 248 U. S. 377; *Texas Company* v. *Hogarth Shipping Company* (1921), 256 U. S. 619; *Hirgi Mulji* v. *Cheong Yue Steamship Co., Ltd.* (1926), A. C. 497; and *Speyer* v. *New York Insurance Co.* (1808), 3 Johns (N. Y.) 88; discussed at pages 15-18 of our brief in this Court, there was a formal Government prohibition, or requisition of use. But in *Horlock* v. *Real* (1916) 1 A. C. 486 (Brief, p. 15) there was merely the German Government's physical detention of the vessel *in fact;* and the *ratio decidendi* of all of the above cases was that there had been *in fact* a restraint or requisition by Government, which was of *indefinite duration.*

In *Hirji Mulji* v. *Cheong Yue Steamship Co., Ltd.; supra,* Lord Sumner, writing for the Judicial Committee of the Privy Council said at pages 506, 507:

> "That requisition, or at any rate requisition for so long as showed that it was to endure *for a considerable though indefinite time* (whichever be regarded, in fact, as the event defeating the adventure), *of itself terminates the charter and all its parts, as soon as it happened,* is a conclusion, which though warranted and binding in view of these and other passages, does not depend merely on the language, which a long sequence of the highest authorities have happened to use. It rests on principle, and is the only way of reconciling the special rule as to frustration with the general rules as to the obligation of contracts." (Italics ours.)

And again at page 509:

> "Evidently, therefore, whatever the consequences of the frustration may be upon the conduct of the parties, *its legal effect does not depend on their*

> *intention, or their opinions, or even knowledge, as to the event,* which has brought this about, *but on its occurrence* under such circumstances as show it to be inconsistent with further prosecution of the adventure." (Italics ours.)

In *Allanwilde Corporation* v. *Vacuum Oil Co., supra,* this Court said:

> "The duration (of the embargo against sailing vessels) was of indefinite extent. Necessarily, the embargo would be continued as long as the cause of its imposition—that is, the submarine menace—and that, as far as then could be inferred, would be the duration of the war, of which there could be no estimate or reliable speculation. The condition was, therefore, so far permanent as naturally and justifiably to determine business judgment and action depending upon it. *The Kronprinzessin Cecilie,* 244 U. S. 12."

In the present case, both the District Court and the Court of Appeals found as *a fact* that the insured voyage of the *Portmar* had been terminated. The District Court found that the Army had taken over the *Portmar* completely for war purposes (R. 718), and "It was the act of paramount power which prevented the homeward voyage and sent the *Portmar* on to Timor" (R. 747).

The Court of Appeals likewise found that the *Portmar* had been taken over by the United States Army at Brisbane January 5, 1942, and that this had "put an end to the possibility of that return voyage for which alone the Underwriters meant to insure her" (R. 794) and held:

> "We hold that the voyage ended at Brisbane and that the policy then ceased to cover the ship" (R. 802).

In his opening statement to the District Court the United States Attorney, after describing the desperate plight of the Allies in Australia, continued:

> "and the military at that time was controlling every vessel, every cargo, every piece of equipment that had value whatsoever in a military sense with a view to using it for military purposes as military necessity dictated" (R. 101).

Colonel Plant, the United States Army's Chief of Water Transportation in the Southwest Pacific Area, testified to the facts (R. 183-188), on which the Government's opening statement was based. Without restating his testimony, it was epitomized in the following:

> "Q. What vessels did you exercise control with respect to? A. Every vessel we could get our hands on" (R. 186).

and

> "In the meantime, we were looking around desperately for anything that was afloat or could be made to float" (R. 187).

As this Court pointed out, from December 11, 1941, on, the *Portmar's* "every movement was in obedience to orders issued by competent United States and Australian authorities", and that she was "subject to these orders." (Opinion p. 2). The prevailing opinion of this Court does not mention the fact that at Brisbane, January 5-9, 1942, some new cargo was put aboard by the Army (R. 285, 286, 793, 794), making it a new and different venture from that point on.

In view of the line of Court decisions above referred to, the undisputed testimony of Colonel Plant, and the Finding of Fact by both the District Court and the Court of Appeals that the return voyage had been prevented, the

respondents respectfully but urgently request an opportunity to argue the termination of the insured voyage for the reconsideration of this Court. The point is of great importance for the future, inasmuch as a sudden outbreak of war, or even threat of war, will certainly result in many such requisitions of American vessels by Army officers in various points throughout the world.

The prevailing opinion of this Court has made an "unambiguous objectively provable decision * * * by the requisitioning sovereign", a requisite to a finding of frustration or termination of voyage (Opinion p. 17). We respectfully submit that such a holding reverses what the law has been, certainly since *Horlock* v. *Beal,* 1916, when the House of Lords held that a frustration or termination of voyage results in law from a restraint or requisition *in fact,* provided it be of indefinite duration. This distinction was not raised by the petitioner, nor argued in any court in this case.

II.

The prevailing opinion of this Court has held that although the first half of the Free of British Capture clause or rider is an absolute warranty against Allied restraint or requisition, the second half of the clause (appearing for the first time in January 1940) reinstates insurance against Allied restraint or requisition.

The entire clause, printed at pp. 33, 34 of our brief, reads as follows:

> "Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great

> Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in cooperation with or under the control of them or any of them; but unless the insured Vessel is condemned this warranty shall not exclude losses **otherwise covered by this policy** which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure, or Detention. B. C. 2." (Emphasis ours.)

The clause is a clause paramount: "Notwithstanding anything to the contrary, etc." The first half of the clause is an unqualified warranty against Allied restraint, detainment, requisition, etc. In the second half, which makes certain exceptions to the absolute warranty of exclusion, this Court has read, "otherwise covered by this policy" as referring to the *causes of loss* enumerated in the general war-risk rider of the policies. We point out, however, that the causes of loss applicable to the Free of British Capture rider are specifically enumerated in the rider itself as those "which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision". The list of causes of loss applicable to the Free of British Capture rider thus includes *marine* perils which are not named in, or covered by any other part of the policies.

With all deference, we submit that the words "otherwise covered by this policy" obviously do not refer to *causes of loss* such as bombs, etc., but to time, place, commercial use of the vessel, connection with the insured voyage, etc., i.e., circumstances which, *absent the requisition*, would bring the loss (if caused by one of the enumerated *causes* of loss) within the four corners of the policy.

The first half of the clause having excluded Allied restraint or requisition, the words "otherwise covered by this policy" obviously mean "in other respects" (Dictionary definitions, our brief, p. 35) than restraint or requisition. The prevailing opinion holds that Allied restraint or requisition is *included* under the word *"otherwise"*.

The final words, "provided such losses would not be covered by a marine insurance policy, etc." obviously mean merely that these underwriters are not liable for a loss if it is covered by a marine insurance policy.

If the wording of the second half of the Free of British Capture clause means that loss while under requisition is otherwise covered by the policy (Opinion, p. 7), then the *entire* Free of British Capture rider was useless, except for the provision excluding all losses if "the insured Vessel is condemned". That would have been stated in a single sentence.

The meaning which underwriters claim for the Free of British Capture clause is that stated in the original records of the American Marine Hull Insurance Syndicate (comprising about 80 insurance companies, R. 229), which formulated and promulgated the clause, first as to cargo (R. 241-2, 682), and then in January, 1940, as to hull, as discussed on pp. 42, 43 of our brief. The original record of the American Syndicate (Underwriters' Exhibit 4, R. 673-675) referring to the hull clause, describes it as "to conform with change made in the same clause of the Cargo War Risk Clauses, which covers while being detained for inspection by the British" (R. 674. See also Underwriters' Exhibit 3, R. 671).

This likewise was the testimony of Mr. William D. Winter, outstanding American authority on marine insurance, who has been in the insurance business for more than forty-nine years (R. 239), who had participated in framing

the clause (R. 673), and whose company has no financial interest in the outcome of this suit (R. 239).

With all deference, we submit that the prevailing opinion of this Court has not considered the history, origin and purpose of the second half of the clause, as established by those who are constantly engaged in the insurance business. *Williston on Contracts* (1936 Ed.) Secs. 618, 629; *Restatement of the Law, Contracts,* Sec. 230; *Connecticut Fire Insurance Co.* v. *Davison Chemical Corporation* (1944 D. C. D. M. D.) 54 F. Supp. 2; *Metropolitan Exhibition Co.* v. *Ewing* (1890 C. C. S. D. N. Y.) 42 F. 198; *Calbreath* v. *Gracy* (1805) F. Cas. 2296; 1 Wash. C. C. 219, 220, discussed at p. 42 of our brief.

The prevailing opinion seems to be based in the final analysis on the ground that a policy having the second half of the Free of British Capture clause gives only slightly greater coverage (according to underwriters' contention) than a policy having only the first half of that clause (Opinion, pp. 14, 15). This point was not raised by the petitioner, nor argued in any court in this case.

We point out that insurance is not an agreement to pay for all losses. It is an agreement to pay for losses (1) only from certain enumerated causes and (2) only then under certain (not all) conditions or circumstances. The *Portmar* loss was from one of the causes enumerated in the second half of the Free of British Capture clause, but it was not under the conditions required by that clause as to time, place, or circumstances, including commercial use of the Vessel.

Conclusion.

It is most respectfully but urgently prayed that this Court allow to the respondents a rehearing limited to the two specific points above set forth.

Respectfully submitted,

RUSSELL T. MOUNT,
Counsel for Respondents.

WALTER B. HALL,
WILBUR H. HECHT,
Of Counsel.

Certificate of Counsel.

I, RUSSELL T. MOUNT, counsel for the above named respondents, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

RUSSELL T. MOUNT,
Counsel for Respondents.